

MEMORANDUM

TO: The Board of Environmental Protection

FROM: Robert L. Green, Jr., Project Manager, Bureau of Land and Water Quality

RE: Appeal filed by the 1) the Town of Phippsburg, the Phippsburg Shellfish Conservation Commission, the Phippsburg Land Trust, the Kennebec Estuary Land Trust, the Friends of Merrymeeting Bay, Bob Cummings, Lawrence Pye, Dean Doyle, Dot Kelly, Captain Ethan DeBery, and Laura Sewall; 2) Dot Kelly; and 3) Douglas Watts and Ed Friedman (collectively, the appellants) of Natural Resources Protection Act Approval #L-16281-4E-E-N, for the U.S. Army Corps of Engineers (the applicant) to perform maintenance dredging of the Federal channel at two locations in the Kennebec River in the City of Bath, the Town of Arrowsic, and the Town of Phippsburg, Sagadahoc County.

DATE: July 21, 2011

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Statutory and Regulatory References: The applicable statutory and regulatory framework for this application includes the Natural Resources Protection Act (NRPA) 38 M.R.S.A. § 480-A to 480-HH and the Department's *Wetlands and Waterbodies Protection Rules*, Chapter 310. The *Wetland and Waterbodies Protection Rules* interpret and elaborate on the NRPA criteria. In the sections pertinent to this appeal, the *Wetlands and Waterbodies Protection Rules* guide the Department in determining whether a project's impact on a protected natural resource would be unreasonable. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2(24)(B).

The applicable statutory framework for the Water Quality Certification is the Clean Water Act (CWA), 33 USC 1251 *et seq.* The dredging project qualifies as an "activity...which may result in (a) discharge into the navigable waters" pursuant to the Clean Water Act. Section 401 of the Act requires that any applicant for a federal license or permit to conduct such an activity, which may result in a discharge obtain a certification that the activity will comply with applicable State water quality standards. Normally the discharge of dredged or fill material into a navigable water requires a permit from the Army Corp under Section 404 of the CWA. In this case, the applicant does not apply to itself for a permit. Rather, it authorizes its own dredging projects by applying all applicable substantive legal requirements, including Section 404(b)(1) guidelines, and is required to seek state Water Quality Certification under Section 401 for the disposal of dredged material into navigable waters. 33 C.F.R. § 336.1(a) and (b)(8).

State law authorizes the Department to issue a Water Quality Certification pursuant to Section 401 of the CWA when the standards of classification of the water body and the State's antidegradation policy are met 38 M.R.S.A. Section 464(4)(F)(3).

Location: The project site is located along two sections of the Kennebec River. The first proposed dredge site is at Doubling Point in the City of Bath and the Town of Arrowsic with disposal of dredged material to occur at the Bluff Head Disposal Site in the Town of Phippsburg and the Town of Arrowsic, and the second proposed dredge site is at North Sugarloaf Island Reach with disposal of dredged material to occur at the Jackknife Ledge Disposal Site. Both of these sites are in the Town of Phippsburg.

Procedural History: On February 17, 2011, the applicant submitted an NRPA application and a request for a Water Quality Certification, in accordance with Section 401 of the Water Pollution Control Act (also known as the Clean Water Act, or CWA). The stated purpose of the dredging is to allow the Navy to take delivery of the U.S.S. SPRUANCE from Bath Iron Works (BIW) on September 1, 2011. The applicant proposes to conduct maintenance dredging during the month of August, 2011. The applicant estimates that it will take 3-5 weeks to complete this work.

Under the Lower Kennebec River Navigation Project, the U.S. Army Corps of Engineers is authorized to maintain the Federal channel in the lower Kennebec River. The applicant was also seeking a determination, through the State's Water Quality Certification process and NRPA licensing process, that its project is consistent with the laws Maine deems as its core laws under the Clean Water Act and the Coastal Zone Management Act. A Federal Consistency Review is required prior to dredging.

On February 24, 2011, the Department participated in a public meeting hosted by the Department of Marine Resources (DMR) in Phippsburg to receive comments on the proposed project. In comments dated March 10, 2011 and April 11, 2011, DMR provided an assessment of the impacts the dredging project would have on the fishing industry, as outlined in 38 M.R.S.A. § 480-D(9).

During its review of the application the Department received letters from both abutting and other property owners within the community describing specific concerns about the proposed project.

The Department granted the NRPA permit and the Water Quality Certification in Order #L-16821-4E-E-N, dated April 15, 2011.

Three timely appeals to the Board were filed on May 16, 2011 by the appellants listed above. The Board received responses to the appeals from the Department of the Army New England District Corps of Engineers dated June 16, 2011 and from BIW, as a party of interest, dated June 16, 2011.

Project Description:

Dredging of the Federal channel is proposed in a portion of Doubling Point Reach between Lincoln Ledge, which is approximately 2,350 feet downstream of BIW, to the turn at Doubling Point, covering an area of approximately 35 acres. To reduce the frequency of dredging at Doubling Point, the applicant proposes advanced maintenance

of the channel by removing the sand waves down to elevation -32 Mean Lower Low Water (MLLW), five feet below the river channel depth of -27 feet MLLW, which is the authorized depth pursuant to the Lower Kennebec River Navigation Project. The Doubling Point portion of the project will generate approximately 50,000 cubic yards of fine-grained sand. Disposal of dredged material from this area would be at a delineated in-river site, the Bluff Head Disposal Area, located approximately 1.7 nautical miles downriver from the dredge site. The applicant has disposed of dredged material from Doubling Point at this site six times since 1986, with the last dredge done in 2003.

Additionally, the applicant proposes to dredge the Federal channel to a depth of -27 feet MLLW plus an additional 2-foot overdredge in a portion of North Sugarloaf Island Reach, covering an area of approximately two acres. The North Sugarloaf Island project will generate approximately 20,000 cubic yards of fine-grained sand. Disposal of dredged material from this area would be at a nearshore disposal site located approximately 0.4 nautical miles south of Jackknife Ledge. This site has been used as a disposal site for previous dredge projects, with the last dredge done in 2003.

Environmental Issues:

The appellants argue that the applicant failed to demonstrate that the proposed action will not result in unreasonable adverse impacts to the environment in accordance with the NRPA. The appellants object to Department findings and conclusions relating to the following:

1. The appellants argue that the applicant failed to demonstrate that there are no practicable alternatives that would be less damaging to the environment in accordance with the Department's *Wetlands and Waterbodies Protection Rules*, Chapter 310.

- A. The appellants assert that summer dredging is generally not permitted under NRPA due to severe and unreasonable impacts to shellfish, marine fisheries, aquatic life, and habitat. They argue that the applicant's conclusion that dredging after November 1 would be practicable should not have been accepted by the Department.

The applicant and BIW contend that the project must be completed before September 1st, and they state that it was not feasible to get the necessary approvals and contracting in place before the summer months. They argue that the potential increase in impacts to the environment and uses of the area are not substantial and are outweighed by the timing needs of the project.

- B. The appellants assert that the applicant failed to adequately consider other less damaging practicable alternatives, such as alternate sites, alternate configurations, and reduced project size and scope. The appellants request the Board undertake a more in depth review of all practicable alternatives, including alternative dredging methods (clamshell bucket), reduced scope (minimal dredging instead of overdredging), and alternate disposal sites (upland, offshore, the Portland Disposal Site).

The applicant's response and BIW's comments both contend that each of the alternatives put forth by the appellants is impracticable. They argue that a scaled back depth of dredge would require another dredge sooner than with the proposed depth of dredging, and that each time a dredge is done it increases the potential impacts of sturgeon and clam flats. They contend that the proposed method of using a hopper dredge is more efficient, which will in the end result in fewer impacts, and that use of a hopper dredge is also necessary to meeting the required deadline for the project. With regard to alternative disposal sites, their position is that they are impracticable due to costs, and that the maintaining of the sand within the system is environmentally beneficial.

2. The appellants argue that the applicant failed to demonstrate that the discharge of approximately 70,000 cubic yards of dredged material will be in compliance with Maine's water quality standards set forth in 38 M.R.S.A § 465-B.

A. The appellants assert that disposal of dredged material at the Bluff Head Disposal Area is a violation of Class SA Standards. At the time the applicant submitted its application, half of the Bluff Head Disposal Area was described in 38 M.R.S.A. § 469(5)(B) as being located in Class SA waters and half of it located in Class SB waters. The statute provided that the east side of the Kennebec River, located within the Arrowsic Town boundary was classified as Class SB water, while the west side of the Kennebec River, located within the Phippsburg Town boundary, was classified as Class SA water. LD 1398, which contained the changes to the statute, was passed by the legislature on June 2, 2011, as emergency action. The bill was signed by the Governor and became effective on June 3, 2011. With this legislative action, the statute has been corrected to reflect the Department's original intent and the Bluff Head Disposal Area has been statutorily re-classified so that the west side of the Kennebec River, located within the Phippsburg Town boundary, is now classified as Class SB water.

B. The appellants assert that disposal at the Jackknife Ledge Disposal Site will, because of its proximity to Class SA waters, cause measurable amounts of dredged spoils to enter those Class SA waters, which is not in compliance with 38 M.R.S.A § 465-B(1)(C).

C. The appellants assert that disposal of dredged material at the Bluff Head Disposal Site and the Jackknife Ledge Disposal Site is not in compliance with the Class SB water standards found in 38 M.R.S.A § 465-B(2).

D. Clam flats on the Lower Kennebec River opened for commercial harvesting in 1997. Dredging has typically been performed in winter months when shellfish were not being harvested. The appellants assert that disposal of dredged material at the Bluff Head Disposal Site is not in compliance with the Class SB water standards found in 38 M.R.S.A § 465-B(2)(C), which states that discharges to Class SB waters may not cause adverse impact to estuarine and marine life in that the receiving waters

must be of sufficient quality to support all estuarine and marine species indigenous to the receiving water without detrimental changes in the resident biological community. There may be no new discharge to Class SB waters that would cause closure of open shellfish areas by the Department of Marine Resources. Specifically, the appellants contend that the discharge will result in closure of clam flats by the Department of Marine Resources (DMR).

The appellants also assert that the Order under appeal contains no provisions to stop dredging operations in the event that river sampling indicates the need to close the clam flats.

The applicant and BIW argue that the Legislature's correction of the classification is in effect and the project will meet the SB water quality requirements. They assert that disposal of the dredged material will not adversely affect clam flats in the area.

3. The appellants argue that the applicant failed to demonstrate that the project will not unreasonably harm significant wildlife habitat, endangered species habitat or marine fisheries, as required in 38 M.R.S.A § 480-D(3). The appellants expressed concern over potential impacts to Atlantic salmon, short-nose sturgeon, commercial harvesting of clams, and the lobster fishery.

In their responses, the applicants and BIW state that habitat for Atlantic salmon and short-nose sturgeon has not been defined by the Department of Inland Fisheries and Wildlife and therefore the area impacted does not qualify as Significant Wildlife Habitat under the NRPA. On the issue of impacts, they contend that due to its use of the habitat at the time of the dredging project, Atlantic salmon are unlikely to be harmed. As for short-nose sturgeon, they contend that removing the screen on the dredging equipment and having observers on board may reduce the severity of injuries to the small number of short-nose sturgeon that may be entrained. Moreover, they note that potential impacts to both species are regulated by the federal government and that review process is ongoing. With regard to impacts on clams and lobster, they contend that the predominant size of the grain of the dredged material and the location of the dredge disposal sites will prevent significant impacts.

4. The appellants argue that the applicant failed to demonstrate that the project will not unreasonably interfere with existing scenic, aesthetic, or recreational uses, as required in 38 M.R.S.A § 480-D(1) especially given that the applicant proposes to dredge during the summer. The appellants further argue that the Department's failure to require financial compensation to shellfish harvesters, as recommended by DMR, violates 38 M.R.S.A § 480-D(1) and 38 M.R.S.A § 480-D(3).

The applicant and BIW responded that the short duration of the project will minimize the impacts to uses of the area and the transportation route to the disposal site is a commonly used commercial route.

5. The appellants argue that the Department improperly issued a Water Quality Certification for the discharge of dredged materials because applicable water quality standards are not met and because the certification is in violation of other provisions of the CWA. The appellants assert that the discharge of dredged material is subject to Section 301 of the CWA, which addresses effluent limitations to discharges, and therefore is subject to additional provisions of Section 404 of the CWA. The applicant and BIW responded that the Department properly issued the Water Quality Certification under Section 401 of the CWA, that Sections 301 and 404 of the CWA are inapplicable to the discharge of dredged materials, and that it is the responsibility of the U.S. Army Corp of Engineers, not the Department, to apply Section 404 criteria to the discharge of dredged materials.

Department Recommendation: After reviewing the permitting record, the arguments of the appellants and the applicant's response, the Department recommends that the Board deny the appellants' request to reverse the Department's decision or remand the Water Quality Certification back to the Department, or to alter the scope of work, or impose conditions requiring monitoring of water quality or payment of financial compensation should adverse impacts to existing uses occur.

Estimated Time for Consideration of the Matter: 4 hours